United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1702

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELENA CLASS, et al
Plaintiffs, Appellees

v.

NICHOLAS NORTON, et al
Defendants, Appellants

On Appeal From a Decision of the United States District Court, District of Connecticut

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I.

This action was originally brought as a class action by writ dated December 1, 1971. The plaintiffs were recipients of welfare assistance from the State Welfare Department of the State of Connecticut under the Aid to Families with Dependent Children (AFDC) pursuant to Title 42 U.S.C. Section 601-606. The plaintiffs were seeking injunctive and declaratory relief to compel the defendant-Welfare Commissioner to comply with the HEW regulations contained in 45 CFR Section 206.10(a) 3 and 6 which require that applications for AFDC be processed within 30 days from the date of application. Plaintiffs were also seeking that payments under the AFDC program be made effective from the date of application rather than, as required by the HEW regulation, from the date of approval of the application or 30 days from the date of application, whichever was sooner.

By judgment entered on June 25, 1972 [R 11,] the District Court ordered the defendant-Commissioner to comply with Title 45 C.F.R. § 206.10(2)(3) by determining the eligibility of AFDC applicants within 30 days from the date of application for assistance. The Commissioner was further ordered to make assistance payments effective from the date of application for assistance, whatever the date of determination of eligibility.

The defendant-Commissioner was further ordered to submit bi-monthly reports of the number of pending AFDC applications, including the number pending more than 30 days, which reports were to be filed until July, 1973.

The defendant-Commissioner was also ordered to pay AFDC benefits retroactive to the date of application to all re-

cipients whose applications had been approved since the filing of the action.

The defendant-Commissioner thereafter, in compliance with the Court order, began making AFDC assistance payments effective from the date of application as of June 1, 1972. The defendant also submitted bi-monthly reports of the number of pending AFDC applications until July, 1973, as required by the Court order. But the defendant-Commissioner never did make the retroactive AFDC payments from December 1, 1971, through June 1, 1972. The reason for this failure by defendant to make these payments was never clearly brough out at the contempt hearing. It was not a wilful failure to comply, and the District Court never found it to be so. It appears that this aspect of the order was originally overlooked by the welfare department, and when its enforcement was never sought, it appears to have been forgotten.

On or about January 9, 1974, the plaintiffs moved that the defendant-Commissioner be adjudged in contempt of the District Court's orders for failure to comply with the Court orders of June 16 and June 22, 1972.

By a Ruling On Plaintiffs' Motion for Contempt and Other Relief, filed March 22, 1974, the District Court found that its orders of June 16 and 22, 1972, had not been effectively implemented, [R. 18, p. 2] but that the drastic remedies which plaintiffs seek — citation of the defendant-Commissioner for contempt and issuance of an injunction preventing use of federal funds for the AFDC program in Connecticut — would be inappropriate in the circumstances of this case at this time.

The defendant was ordered within 15 days of the date of the order to take certain steps to properly implement the prior orders of the Court.

Those steps required, *inter alia,*

1) that the defendant-Commissioner make retroactive payments effective from the date of application to all AFDC beneficiaries who were receiving benefits from December 1, 1971, to June 1, 1972, and to submit reports to the Court as to the status of the processing of inactive and active cases covering the period from December 1, 1971, to June 1, 1972, and the number of persons to whom retroactive AFDC payments had been made by the welfare department, [R. 18, pp. 10, 11] and,

2) that ". . . within 15 days from the date of this order, the defendant Norton shall, as Commissioner of Welfare for the State of Connecticut, and in his individual capacity, pay costs and attorneys' fees for the prosecution of this motion in the amount of $1,000 to Fairfield County Legal Assistance Program, Inc., and Tolland-Windham Legal Assistance Program, Inc., plaintiffs' attorneys, such amount to be divided equally between the two legal services programs." [R. 18, p. 15]

ARGUMENT

I.

WAS IT ERROR FOR THE DISTRICT COURT TO AWARD RETROACTIVE WELFARE ASSISTANCE PAYMENTS TO THE PLAINTIFFS IN THIS ACTION; AND IS NOT SUCH A REMEDIAL AWARD AGAINST THE WELFARE COMMISSIONER OF THE STATE OF CONNECTICUT BARRED BY THE ELEVENTH AMENDMENT?

The defendant-appellant in presenting this issue is relying on the recent United States Supreme Court decision in *Edelman* v. *Jordan*, ____ U.S. ____, 39 L.Ed.2d 662, (March 25, 1964). In that case, the Supreme Court reversed that portion of the Court of Appeals decision which had affirmed the District Court's order that retroactive benefits be paid to AABD welfare recipients by the Illinois state officials. The Court held (at p. 680) that: ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*"

The Court, in its opinion, traced the historical basis of the Eleventh Amendment since its ratification in 1798. At p. 672, the Court stated: ". . . [W]hile the Amendment by its terms does not bar suits against a state by its own citizens, *this Court has consistently held* [emphasis added] that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans* v. *Louisiana,* 134 U.S. 1, 33 L.Ed. 842, 10 S. Ct. 504 (1890); *Duhne* v. *New Jersey,* 251 U.S. 311, 64 L.Ed. 280, 40 S. Ct. 154

(1920); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 88 L.Ed. 1121, 64 S. Ct. 873 (1944); *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 12 L.Ed. 2d 233, 84 S. Ct. 1207 (1964); *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279, 36 L.Ed. 2d 251, 93 S. Ct. 1614 (1973) . . ."

The Court then went on to state (p. 672) ". . . [I]t is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." [citing] *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 89 L.Ed. 389, 65 S. Ct. 347 (1945).

The Court [p. 673] quoted, with approval, Judge McGowan's opinion in *Rothstein* v. *Wyman*, 467 F.2d 226 (CA2 1972) cert. denied, 411 U.S. 921, 36 L.Ed.2d 315, 93 S. Ct. 1552 (1973), and at p. 674 as follows: ". . . [I]t is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to run afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."

The Court then stated that it agreed with Judge McGowan's observations. It stated further that the retroactive award, by the lower Court, resembled "far more closely the monetary award against the State itself, *Ford Motor Co.* v. *Department of Treasury, supra*, than it does the prospective injunctive relief awarded in *Ex Parte Young*."

At p. 676 the Court commented: "[W]ere we to uphold this portion of the District Court's decree [the awarding of retroactive payments] we would be obligated to overrule the Court's holding in *Ford Motor Co.* v. *Department of Treasury*,

supra . . . Yet this Court had no hesitation in holding [in that case] that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We read a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case."

In *Edelman,* the Court of Appeals had expressed the view that its holding on the Eleventh Amendment issue was supported by the Supreme Court's decision in *Department of Employment* v. *United States,* 385 U.S. 355, 17 L.Ed.2d 414, 87 S. Ct. 464 (1966). That case had cited *Monaco* v. *Mississippi,* 292 U.S. 313, 78 L.Ed. 1282, 54 S. Ct. 745 (1934). In commenting on the Court of Appeals view, the Supreme Court [p. 676] stated: "[I]n view of Mr. Chief Justice Hughes' vigorous reaffirmation in *Monaco* of the principles of the Eleventh Amendment and sovereign immunity, we think it unlikely that the Court in *Department of Employment* v. *United States,* in citing *Ex Parte Young,* as well as *Monaco,* intended to foreshadow a *departure* from the rule to which, we adhere today." [emphasis added]

It is apparent that the Supreme Court in *Edelman,* took great pains to authenticate, with the numerous cases it cited and discussed, the assertion in its opinion [at p. 672] that ". . . this Court has *consistently* held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State . . ." [emphasis added]

The defendant believes that the Court was saying, in effect, that, at least since 1798, when the Eleventh Amendment was ratified, that the federal courts have *never* had the *power,* because of the immunity conferred by the Eleventh Amendment, to make such an award against a state as the retroactive benefits awarded in the *Edelman* case, and also in the instant case.

The District Court in this action has held [S. 2, p. 9, 10] that *Edelman* should not be applied retroactively. When referring to the ruling of the Court of Appeals that under the tests of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 S. Ct. 349 (1971), the contention of the petitioner was unsound and that the ruling of the District Court was correct in holding that its decision was to be applied retroactively back to July 1, 1968, the Supreme Court said [at p. 670, n.7]: "In light of our disposition of this case on the Eleventh Amendment issue *we see no reason to address this contention.*" [emphasis added]

The defendant believes that the Supreme Court felt it could not discuss its decision on Eleventh Amendment immunity in terms of whether or not it was to be applied retroactively, since it had, in its decision, gone to such pains to demonstrate that "this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." [*Edelman,* supra, p. 672]

Had the Supreme Court held the decision either *was* or *was not* to be applied retroactively, the inescapable inference to be drawn from such a ruling would have been that, for some period of time at least, the prior decisions of the Supreme Court had acted to *suspend* the immunity conferred upon the States from suit under the Eleventh Amendment. This, of course, the Supreme Court has no power to do.

If this case were now before the United States Supreme Court for decision, appellant believes it is likely that the Court would say, as it said in *Edelman, supra,* at page 676: [W]ere we to uphold this portion of the District Court's decree [the awarding of retroactive payments] we would be obligated to overrule the Court's holding in *Ford Motor Company* v. *Department of Treasury . . .*" *Ford Motor Company, supra,* was decided in 1945. The holding in that case has never been over-

turned. It is submitted, therefore, that this Court should rule that, because of the jurisdictional bar imposed by the Eleventh Amendment, the District Court had no power to award retroactive payments to the plaintiffs in this action.

II.

DOES THE ELEVENTH AMENDMENT PROHIBIT THE AWARD OF ATTORNEYS' FEES AGAINST THE DEFENDANT-COMMISSIONER OF WELFARE IF THESE FEES ARE TO BE PAID OUT OF THE STATE TREASURY?

A. CAN THE AWARD OF ATTORNEYS' FEES COME WITHIN THE PURVIEW OF "PROSPECTIVE INJUNCTIVE RELIEF"?

As previously stated, *Edelman* v. *Jordan, supra,* held that the power of a federal district court to act against a state is limited to the granting of prospective injunctive relief only. The Supreme Court also stated in that case [p. 672] ". . . [I]t is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." [citing] *Ford Motor Co.* v. *Department of Treasury, supra.*

Thus it would appear that under the holding in *Edelman,* the award of attorneys' fees against a state official, which fees are to be paid from the state treasury, is barred by the Eleventh Amendment, since such an award by a federal district court is not one which is limited to prospective injunctive relief only. The Supreme Court stated in *Edelman, supra,* [p. 674] when commenting on the award of retroactive welfare payments, that such an award, by the lower Court, resembled "far more closely the monetary award against the State itself, *Ford Motor Co.* v. *Department of Treasury, supra,* than it does the prospective injunctive relief awarded in *Ex Parte Young.*"

That reasoning, it would seem, applies with equal force to the award of *attorneys'* fees which are to be paid from the state treasury.

As Judge McGowan stated in *Rothstein* v. *Wyman, supra* [pp. 236-237]: "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparations for the past. The latter would appear to us to run afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." [footnotes omitted]

But does not the award of attorneys' fees closely parallel the award of retroactive benefits? Is this not also an effort "to order the Commissioner to use state funds to make reparations for the past," and is it not thereby barred by the Eleventh Amendment?

Certainly, the award of attorneys' fees bears a closer relationship to bring reparations for the past than it does to being "a necessary consequence of compliance in the future with a substantive federal question determination" which was the test prescribed by *Edelman, supra,* at 675. If that is so, then the award of attorneys' fees against a state, to borrow Judge McGowan's words, *supra,* ". . . would appear to . . . fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."

B. CAN ATTORNEYS' FEES BE AWARDED AGAINST A STATE AS A FORM OF EQUITABLE RELIEF?

In *Edelman* v. *Jordan, supra,* the Supreme Court noted in its opinion [at p. 674] that: "[T]he Court of Appeals, in upholding the award [of retroactive payments] in this case, held

that it was permissible because it was in the form of "equitable restitution" instead of damages, and therefore capable of being tailored in such a way as to minimize disruptions of the state program of categorical assistance. But we must judge the award actually made in the case, and not one which might have been differently tailored in a different case, and we must judge it in the context of the important constitutional principle embodied in the Eleventh Amendment. [footnote omitted]

"We do not read *Ex Parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, as long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex Parte Young* hewed to no such line. Its citation of *Hagood* v. *Southern,* 117 U.S. 52, 29 L.Ed. 805, 6 S. Ct. 608 (1886), and *In re Ayers,* 123 U.S. 443, 31 L.Ed. 216, 8 S. Ct. 164 (1887), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment."

It is submitted therefore that the decision in *Edelman* bars the award of attorneys' fees against the state, even if such an award is characterized as "equitable" in nature.

C. CAN THE AWARD OF ATTORNEYS' FEES AGAINST A STATE BE PERMITTED UNDER THE QUALIFICATION OF *EDELMAN* THAT "SUCH AN ANCILLARY EFFECT ON THE STATE TREASURY IS A PERMISSIBLE AND OFTEN INEVITABLE CONSEQUENCE OF THE PRINCIPLE ANNOUNCED IN EX PARTE YOUNG"?

In the instant case, the District Court, in its Ruling On The Application For a partial Stay Order [S2, p. 8] held that

the award of attorneys' fees to plaintiffs' counsel was not barred by the Eleventh Amendment under *Edelman*. The Court, in support of its ruling, cited the recent case of *Jordan* v. *Fusari*, Dkt. No. 73-2364 (2d Cir., April 29, 1974). Defendant believes that the factual situation in that case is clearly distinguishable from the instant case.

In *Fusari*, the District Court awarded attorneys' fees to plaintiffs' attorneys in a case in which the defendant was the Commissioner of Labor and Administrator of the Unemployment Compensation Act of the State of Connecticut. But in that case, the attorneys' fees awarded by the Court were to be a percentage of the awards of the plaintiff class, and were not to be paid from funds out of the state treasury.

In addition, the Court found that a settlement of the claim for back unemployment insurance benefits was a *waiver* by the defendant of any Eleventh Amendment defense as to those benefits *Jordan* v. *Fusari*, *supra*, slip opinion, p. 3067.

Fusari was remanded to the District Court, but the Court of Appeals opinion, at p. 3067, contained the suggestion that: "[t]he district court should further consider the alternative theories appellees now advance, which may well justify[1] a judgment imposing reasonable attorneys' fees on defendant, without deduction from the awards to plaintiffs' class." [footnote omitted] The question of state immunity under the Eleventh Amendment in light of *Edelman* does not appear to have been briefed and argued. And since the Court of Appeals clearly found a waiver of any Eleventh Amendment defense, the decision did not purport to be an interpretation by the Court of the opinion in *Edelman*.

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[1]The word "justify" would seem to connote an equitable remedy. But *Edelman* v. *Jordan*, *supra*, pp. 674-675, held that: "[w]e do not read *Ex parte Young* or subsequent holdings . . . to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable in nature.'"

The Court of Appeals, in *Fusari* v. *Jordan, supra,* did cite several cases, at pp. 3066-3067, n. 7 and 10, in support of its suggestion to the district court, on remand, that the lower court "further consider the alternative theories appellees now advance, which may justify imposing reasonable attorneys' fees on the defendant . . ." All of the cases cited, however, predated *Edelman* v. *Jordan, supra,* except *Brandenburger* v. *Thompson.* Dkt. No. 72-2224 (9th Cir. March 25, 1974. *Brandenburger* was decided on the very same day as *Edelman,* and so the Court of Appeals for the Ninth Circuit did not have available to it the Edelman opinion in arriving at its decision.

In the recent case of *Jordon* v. *Gilligan,* 42 U.S.L.W. 2590 (April 25, 1974), the Court of Appeals for the Sixth Circuit has held that the Eleventh Amendment is a bar to a federal district court's awarding of attorneys' fees against a state or its officials acting in their official capacity in a suit brought under 42 U.S.C. § 1983, seeking a declaratory judgment, on behalf of all Ohio voters, that a reapportionment plan for the Ohio legislature was constitutionally unsound.

In that case the district court initially awarded attorneys' fees and expenses without objection from defendants who were state officials. The State of Ohio was not named a defendant. The judgment remained unpaid for eight months so the district court ordered the award taxed as costs against the State of Ohio. Defendants thereupon moved to vacate the award of attorneys' fees under Fed. R. Civ. P. 60(b), whereupon the district court denied the motion.

The Court of Appeals held that: ". . . the Eleventh Amendment contain an express constitutional limitation on the power of federal court that, through judicial interpretation, has been held to bar a citizen's suit against his own state. The rationale behind the doctrine of sovereign immunity embodied in the Eleventh Amendment is the protection of the state's fiscal in-

tegrity. A suit by private parties seeking to impose liability that must be paid from public funds in the state treasury is barred." *Jordon* v. *Gilligan, supra,* p. 2590.

The Court stated further that the U.S. Supreme Court had clarified the principles under which a federal court may award attorneys' fees in *Hall* v. *Cole,* 412 U.S. 1, 41 U.S.L.W. 4658 (1973). It said that the Court recognized the "class benefit" rationale for awarding fees where the plaintiff's successful litigation confers a substantial benefit on the members of an ascertainable class. The Court of Appeals said, however, that in *Hall* v. *Cole, supra,* the Supreme Court pointed out that the class benefit theory can only be employed where the court has *the requisite jurisdiction* to make such an award.

The Court of Appeals rejected the claim advanced by the plaintiff that the Supreme Court in affirming *Sims* v. *Amos,* 409 U.S. 942 (1972), established a federal district court's power to award attorneys' fees against officials of the State of Mississippi, even though the award was to be paid from state funds.

The Court of Appeals also cited in its opinion the case of *Gates* v. *Collier,* 489 F.2d 298 (1973) in which the Fifth Circuit had affirmed an award of attorneys' fees against officials of the State of Mississippi even though the award was to be paid from state funds.

The Court concluded by stating: "Whether an award of attorneys' fees differs from an award of damages is irrelevant, and the position taken by the Fifth Circuit will not be followed here. Accordingly, where a state has not waived its sovereign immunity, the Eleventh Amendment bars a federal court from awarding attorneys' fees against it." *Jordon* v. *Gilligan, supra.*

In a dissenting opinion in *Edelman,* Justice Douglas observed that: ". . . [m]ost welfare decisions by federal courts have a financial impact on the states." 39 L.Ed. 2d, p. 683. But this objection to the holding that a federal district court's power to act against a State is limited to prospective injunctive relief under the Eleventh Amendment was anticipated in the Court's opinion as follows: ". . . The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young . . . [b]ut the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature . . ." The Supreme Court then went on to say: "*[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.*" 39 L.Ed. 2d, p. 675 [emphasis added]

It is difficult to see how the award of attorneys' fees against a state can come under this definition.

Admittedly, as indeed occurred in this case, a party may employ the services of an attorney in seeking the *enforcement* of a court decree which at the time of its rendition was prospective in nature. But the award of attorneys' fees for such a purpose does not fit within the "ancillary effect" definition. It is not "the necessary result of compliance with decrees which by their terms are prospective in nature."

Near the close of its opinion in *Edelman,* the Supreme Court emphasized, once again, its view of the restrictive effect which the Eleventh Amendment has upon the federal judi-

ciary's power to act against a state, by quoting from *Ford Motor Co.* v. *Department of Treasury, supra, as follows*:

". . . The Eleventh Amendment declares a policy and sets forth *an explicit limitation on federal judicial power of such compelling force* that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." [citation omitted] [emphasis added] *Edelman* v. *Jordan, supra,* at p. 681.

There may, of course, be other "ancillary effects" resulting from a federal court's decision in a case involving a State. But just any "ancillary effect" will not do in order to come within the ambit of "a permissible and often inevitable consequence of the principle announced in Ex parte Young" as set forth in *Edelman, supra.* To permit a federal court to award relief against a State, which relief will entail the expenditure of funds from the state treasury, two conditions must be met:

(1) the decree must be for prospective injunctive relief only; and,

(2) the fiscal consequences to the state treasury must be the necessary result of compliance with such a decree. Any enlargement, by a federal court, upon these requirements is contrary to the holding in *Edelman,* and such an award, therefore, would run afoul of the immunity which a State has under the Eleventh Amendment.

III.

DOES NOT THE ELEVENTH AMENDMENT ALSO BAR THE AWARD OF COSTS WHICH ARE TO BE PAID OUT OF THE STATE TREASURY?

It is submitted that the foregoing arguments, which hold that the award of attorneys' fees against a State is barred by the Eleventh Amendment, apply equally to the award of costs against a State.

IV.

DID THE DISTRICT COURT ERR WHEN IT ORDERED THE DEFENDANT-COMMISSIONER OF WELFARE TO PAY ATTORNEYS' FEES AND COSTS TO PLAINTIFFS' COUNSEL IN HIS *INDIVIDUAL* CAPACITY AS WELL AS IN HIS OFFICIAL CAPACITY?

In addition to ordering the defendant-Commissioner of Welfare to pay costs and $1,000 in attorneys' fees to the attorneys for the plaintiffs in his capacity as Commissioner of Welfare of the State of Connecticut, the District Court also ordered that defendant pay these costs and attorneys' fees in his *individual* capacity. [R. 18, p. 15]

The Eleventh Amendment of course does not bar an award of damages against a state official in his individual or personal capacity, *Ford Motor Co.* v. *Department of Treasury, supra; Westberry* v. *Fisher,* 309 F. Supp. 12 (D. Maine, 1970). In this case, it was attorneys' fees and costs, not damages, that were awarded by the District Court against the defendant-Commissioner. It is submitted, however, that for purposes of holding a public official individually liable in an action under 42 U.S.C. Section 1983, there is little distinction between the awarding of damages on the one hand and attorneys' fees and costs on the other.

Section 1983 makes liable "every person" who, under cover of state law, deprives another person of his civil rights. In *Pierson* v. *Ray,* 386 U.S. 547, 554, 87 S. Ct. 1213, 1218; 18 L.Ed. 2d 288 (1967) the United States Supreme Court held that it was not the intention of Congress in enacting 42 U.S.C. Section 1983 "to abolish wholesale all common law immunities." In that case, it was held that a judge was immune from liability under Section 1983, and, as to police officers, it was held that the defense of good faith and probable cause was available to them under Section 1983.

The Supreme Court has also held that Section 1983 did not abolish the immunity of legislators for acts done within their legislative role. *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). The lower federal courts have since extended the immunity to many judicial and quasi-judicial officers.

In *Westberry* v. *Fisher*, 309 F. Supp. 12 (1970), it was held that the Commissioner and administrative personnel of the Maine State Department of Health and Welfare were not personally liable under the civil rights statute [42 U.S.C. Sec. 1983] for damages to ADC recipients to whom were applied the Department's unconstitutional maximum budget and maximum grant regulations, where there was no abuse of discretionary authority, malice or ill-will on the part of defendants, and the Commissioner acted within the scope of his authority in respect to regulations and within his rule-making power.

In that case, the district court said at p. 16: "[T]he Supreme Court has not definitively spoken on the applicability of the doctrine of governmental immunity in actions brought under Section 1983 against state administrative officials, such as the defendants in this case. Plainly, such officials are not entitled to the absolute immunity which has been accorded to legislators and judges, for 'to hold all state officers immune from suit would very largely frustrate the salutary purpose of the provision.' *Jobson* v. *Henne*, 355 F.2d [129] at 133; [1966], *Hoffman* v. *Halden*, 268 F. 2d 280, 300 (9th Cir. 1959). However, in addition to reaffirming the common-law immunity of judges, the Court in *Pierson* v. *Ray* specifically held that the defense of good faith and probable cause was available in an action under Section 1983 to police officers who had arrested the petitioners, acting under a statute which was subsequently held to be unconstitutional, but which the officers had probable cause to believe to be valid [citations omitted]. [T]he Court thus made it clear that state

officers, although not entitled to an absolute and unqualified immunity have at least a limited immunity for acts done by them in good faith within the scope of their official duties."

To the same effect is *Jordan* v. *Weaver*, 472 F.2d 985 (1973). In that case the court said at p. 999: "[A]s in *Westberry* v. *Fisher* [citation omitted], the record is utterly devoid of any proof of abuse of discretionary authority, malice, or ill-will on the part of defendant Swank. In our view, the district judge did not abuse his discretion in denying punitive damages."

In the instant case there was no finding by the District Court that the defendant-Commissioner had acted out of malice or ill-will; nor that there was an abuse of discretionary authority; nor that defendant had acted beyond the scope of his authority. On the contrary, the District Court found [R. 18, p. 4] that, "[T]here appear to be several factors contributing to the ineffective implementation of this Court's orders. At the hearing on this motion . . . [welfare department officials] both indicated in their testimony that delays in paying retroactive benefits and in processing pending applications could be traced to a lack of sufficient numbers of office personnel."

The District Court went on to say [R. 18, p. 5], "[A] second factor contributing to the ineffective implementation of this Court's orders appears to be specific procedures utilized by local offices of the State Welfare Department in processing applications for assistance, a factor which may be attributed to a misunderstanding of the requirements of this Court's orders on the part of Welfare Department personnel."

The District Court further stated [R. 18, p. 10], "[A]lthough the failure of compliance with this Court's prior orders on the part of the Department appears to have been substantial, I have concluded that the drastic remedies which plaintiffs seek — citation for contempt and the issuance of

an injunction preventing use of federal funds for the AFDC program in Connecticut — would be inappropriate in the circumstances of this case at this time. [citations omitted] It appears that much of the failure of compliance may have been the result of good faith attempts on the part of Department personnel to implement policies which were not sufficiently clarified by Department administrators."

In view of the foregoing statements by the District Court, the defendant-Commissioner is at a loss to understand why the Court imposed upon him [R. 18, p. 15] an order to pay costs and $1,000 in attorneys' fees to plaintiffs' attorneys, "as Commissioner of Welfare for the State of Connecticut, *and in his individual capacity . . .*"

Defendant believes this is a departure from the prior holdings of the federal courts on this question enunciated in such cases as *Westberry* v. *Fisher, supra,* and *Jordan* v. *Weaver, supra,* and that it is tantamount to a finding of *absolute liability* on the part of public administrative officials acting in good faith in the discharge of their duties. Were the federal courts to follow the District Court's ruling in this case, on this question, the *limited* liability concept announced in *Westberry* v. *Fisher, supra,* would be abolished.

CONCLUSION

For the foregoing reasons the defendant-appellant respectfully requests that those portions of the District Court's orders with respect to the award of retroactive payments to the plaintiffs, and the award, against the defendant Commissioner, of attorneys' fees to the plaintiffs' attorneys, and costs be set aside.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ELENA CLASS, ET AL	)	
	)	
Plaintiffs, Appellees	)	
	)	
VS.	)	NO: 74-1702
	)	
NICHOLAS NORTON, ET AL	)	
	)	
Defendants, Appellants	)	

CERTIFICATION

This is to certify that on the 27th day of June, 1974, one (1) copy of the Brief of Appellant was mailed, postage prepaid, special delivery; and on the 28th day of June, 1974, two (2) copies of the Brief of Appellant were mailed, first class mail, to the following counsel of record:

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